

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
County of Tazewell, Illinois )
and Sprint Nextel ) WT Docket No. 02-55
Mediation No. TAM-12319 )

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 2007

Released: May 11, 2007

By the Associate Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a case referred to us for de novo review from Wave 1, Stage 2 mediation by the 800 MHz Transition Administrator (TA) and involving a dispute between Tazewell County, Illinois (County) and Sprint Nextel Corporation (Sprint). The sole issue in dispute is whether Sprint must provide the County with "NPSPAC-capable" radios in the new NPSPAC band, i.e., radios that are capable of operating on both mutual aid and non-mutual aid channels in the new NPSPAC band after rebanding. Based on our de novo review of the mediation record and the parties' position statements, we find in favor of the County on this issue.

II. BACKGROUND

2. The 800 MHz R&O and subsequent orders in this docket require Sprint to negotiate a frequency relocation agreement (FRA) with each 800 MHz licensee that is subject to rebanding. The FRA must provide for relocation of the licensee's system to its new channel assignment at Sprint's expense, including the expense of retuning or replacing the licensee's equipment as required. Sprint must provide the relocating licensee with "comparable facilities" on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.

A. Issue in Dispute

3. This case concerns approximately 262 EDACS mobile radios that are part of the County system. These radios are licensed to operate on the five NPSPAC mutual aid channels under the

1 See Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) (800 MHz Report and Order); Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) (800 MHz Supplemental Order); Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005).

2 800 MHz Report and Order, 19 FCC Rcd at 14977 ¶ 11.

3 Id. at 14986 ¶ 26.

4 Tazewell County Proposed Resolution Memorandum, filed February 23, 2007 (Tazewell PRM), at 2;

County's call sign WQCX272.<sup>5</sup> The radios are also technically capable of operation on all channels in the current NPSPAC band, including non-mutual aid channels, but the County is not presently licensed to operate on non-mutual aid NPSPAC channels.<sup>6</sup> The sole issue in dispute concerns whether Sprint must replace the County's existing EDACS radios with "NPSPAC-capable" radios, *i.e.*, radios that will be capable of operating on all channels in the new NPSPAC band after rebanding. The County asserts that Sprint must provide radios that are fully NPSPAC-capable, which in this case requires the existing EDACS radios to be replaced.<sup>7</sup> Sprint contends that it is only required to retune the County's existing radios to make them capable of operating on the five mutual aid channels in the new NPSPAC band -- but not on any other NPSPAC channels -- which can be accomplished by reprogramming the existing EDACS radios.<sup>8</sup> The difference in cost between replacing and reprogramming the radios at issue is approximately \$500,000.<sup>9</sup>

4. The parties entered into mediation on November 1, 2006. The mediation period ended on December 14, 2006, but was extended to allow continued mediation of issues.<sup>10</sup> When the parties were unable to resolve their dispute over the NPSPAC-capable radio issue, the mediator forwarded the mediation record and his Recommended Resolution to PSHSB.<sup>11</sup>

## B. Parties' Positions

5. *County Position.* The County asserts that under the "comparable facilities" standard applicable to 800 MHz rebanding, Sprint must provide the County with radios that have the same technical capability as its existing radios.<sup>12</sup> The County notes that its EDACS radios are currently capable of operating on all NPSPAC-channels on a trunked basis, even though the County is only licensed to operate on the five NPSPAC mutual aid channels. Accordingly, the County contends that under the comparable facilities standard, it is entitled to radios that have full trunking capability in the new NPSPAC band. If the County's radios are only capable of operating on the mutual aid channels after rebanding, the County argues, it will have received non-comparable equipment that lacks a key capability of its existing radios.<sup>13</sup>

6. *Sprint Position.* Sprint contends that it is only required to provide the County with radios

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Sprint Nextel Proposed Resolution Memorandum, filed February 16, 2007 (Sprint PRM), at 3. The County has other mobile and portable units in its system that are not at issue here. *See* Tazewell PRM at 2.

<sup>5</sup> Tazewell PRM at 1. Tazewell's system is part of a larger multisite system that also operates on interleaved channels licensed to Ragan Communications under call sign WPNW387. The facilities on these interleaved channels do not require rebanding and are not at issue here. *Id.*

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 4-7. The parties do not dispute that the EDACS radios at issue cannot be reprogrammed to operate on non-mutual aid channels in the new NPSPAC band. Accordingly, the only way for the County to obtain radios that have the same capability in the new NPSPAC band is to replace its existing EDACS radios.

<sup>8</sup> Sprint PRM at 3-6.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> TA Mediator Recommended Resolution, filed March 12, 2007 (RR), at 2.

<sup>11</sup> *Id.*

<sup>12</sup> Tazewell PRM at 4-6.

<sup>13</sup> *Id.*

that support the County's current radio use.<sup>14</sup> Because the County's current NPSPAC operations are limited to the five mutual aid channels, Sprint asserts that the County is only entitled to radios that can operate on the mutual aid channels in the new NPSPAC band. Sprint contends that it is irrelevant whether the County's existing radios are technically capable of operating on additional NPSPAC channels, because the County neither uses those channels nor is licensed to do so. If Sprint were required to provide the County with additional NPSPAC channel capability in its new radios, Sprint argues, it would be providing an unwarranted equipment upgrade rather than comparable facilities.<sup>15</sup>

7. *Mediator Recommendation.* The TA mediator recommends finding in favor of Sprint on this issue. The mediator agreed with Sprint that the Commission's comparable facilities standard focuses on the manner in which the licensee uses its current system. The mediator concluded that providing the County with the ability to use NPSPAC mutual aid channels but not other NPSPAC channels would be sufficient to meet this standard.<sup>16</sup>

### III. DISCUSSION

8. We conclude that to meet the comparable facilities standard with respect to the County's EDACS radios, Sprint must provide radios that have the same technical capability as the County's current radios, *i.e.*, they must be capable of trunked operation on non-mutual aid channels in the new NPSPAC band. In the *800 MHz Report and Order*, the Commission stated that under the comparable facilities standard, relocating licensees are entitled to receive "systems with comparable technological and operational capability."<sup>17</sup> In the instant case, it is undisputed that the County's EDACS system includes radios that are capable of trunked operation on non-mutual aid NPSPAC channels. Sprint, however, contends that the comparable facilities standard would be satisfied by reprogramming the radios to operate only on the NPSPAC mutual aid channels in the new NPSPAC band, while leaving them incapable of operating on non-mutual aid channels in the new band. Thus, the reprogrammed radios would lack an operational capability that the County's existing radios possess. As discussed below, we find Sprint's position to be inconsistent with the comparable facilities standard.

9. In defining "comparable facilities" for purposes of this proceeding, the Commission adopted the definition of the term that was applied to 800 MHz licensees from an earlier rulemaking, and that is codified in Section 90.699(d) of the Commission's rules.<sup>18</sup> Under that definition, the first requirement of the comparable facilities standard is that the licensee responsible for relocation "must provide the relocated incumbent with a comparable system."<sup>19</sup> The characteristics of the system are "defined functionally from the end user's point of view," and include both base station facilities "and all

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<sup>14</sup> Sprint PRM at 3-5.

<sup>15</sup> *Id.* at 6

<sup>16</sup> RR at 6-8.

<sup>17</sup> *800 MHz Report and Order*, 19 FCC Rcd at 14977 ¶ 11.

<sup>18</sup> The comparable facilities definition for the 800 MHz band was adopted in 1997 when the Commission provided for relocation of site-based licensees in the "Upper 200" channels by Economic Area (EA) licensees. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, PR Docket 93-144, 12 FCC Rcd 19079, 19111-19115 ¶¶ 89-95 (1997) (*800 MHz SMR 2<sup>nd</sup> R&O*). See 47 CFR § 90.699(d). The Commission expressly adopted the same definition of comparable facilities for purposes of 800 MHz rebanding. *800 MHz Report and Order*, 19 FCC Rcd at 15077 ¶ 201 n.526; *800 MHz MO&O*, 20 FCC Rcd at 16032 ¶ 38 n.79.

<sup>19</sup> *800 MHz SMR 2<sup>nd</sup> R&O*, 12 FCC Rcd at 19112 ¶ 91. In addition, the facilities must be comparable in terms of channel capacity, quality of service, and operating costs. *Id.* at 19112-19114 ¶¶ 92-95.

mobile units associated with those base stations.”<sup>20</sup> Thus, applying this standard to the County’s system, Sprint’s obligation to provide comparable facilities requires it to provide mobile radios that are technically and operationally comparable to the licensee’s existing radios.

10. Sprint contends that it is not required to provide radios with the same operational capability as the County’s existing radios because the County is not licensed to use its existing radios to their full operational capacity. Sprint contends that its position is supported by language in the *800 MHz Report and Order* that “comparable facilities” are defined in terms of the “channel capacity” of the system that is “currently available to the end user.”<sup>21</sup> The reference to “channel capacity . . . available to the end user,” Sprint asserts, allows it to provide the County with technologically inferior radios so long as they have sufficient “capacity” to meet the County’s current usage needs, which do not include the non-mutual aid NPSPAC channels.<sup>22</sup>

11. We disagree with both Sprint’s and the mediator’s interpretation of this language. Although “equivalent channel capacity” is another element of comparable facilities, it refers to the number and bandwidth of the replacement channels that must be assigned to the relocating licensee, not the technical specifications of the licensee’s radios.<sup>23</sup> Under this element, the County is only entitled to assignment of the same number of replacement channels in the new NPSPAC band that it is currently using, *i.e.*, the five mutual aid channels. However, that is not the issue in dispute here. The County is not seeking to be licensed for additional non-mutual aid channels in the NPSPAC band, but only seeks to obtain radios that have the same technological and operational capability as its existing radios. The number of channels for which the County is currently licensed is not a limitation on Sprint’s obligation to provide comparable radios as part of a “comparable system.” Conversely, the fact that the County’s radios are capable of operating on additional NPSPAC channels does not entitle the County to a greater number of replacement NPSPAC channels than it is currently using.<sup>24</sup>

12. Sprint also cites the Bureau’s February 12, 2007 letter in which we responded to a letter from Sprint that asked about its obligation to pay for retuning of equipment operated under non-primary authorizations held by public safety licensees, including mobile-only authorizations and secondary

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<sup>20</sup> *Id.*

<sup>21</sup> Sprint PRM at 4, citing *800 MHz Report and Order*, 19 FCC Rcd at 15077 ¶ 201. Though the text in paragraph 201 cited by Sprint does not list a “comparable system” as one of the elements of comparable facilities, the text does not state that the elements in paragraph 201 are the only factors to be considered, and the footnotes to the text in this paragraph cite the definition of comparable facilities adopted in the *800 MHz SMR 2<sup>nd</sup> R&O*, which includes a “comparable system.”

<sup>22</sup> Sprint PRM at 3-5; see also Sprint Reply to Tazewell PRM, filed February 28, 2007, at 5 (Sprint Reply).

<sup>23</sup> In the *800 MHz SMR 2<sup>nd</sup> R&O*, the Commission defined channel capacity as “the same number of channels with the same bandwidth that is currently available to the end user. For example, if an incumbent’s system consists of five 50 kHz (two 25 kHz paired frequencies) channels, the replacement system must also have five 50 kHz channels. If a different channel configuration is used, it must have the same overall capacity as the original configuration.” *800 MHz SMR 2<sup>nd</sup> R&O*, 12 FCC Rcd at 19112-13 ¶ 92.

<sup>24</sup> Our decision is thus consistent with Commission orders that have defined comparable channel capacity or “throughput” in terms of the amount of bandwidth needed to satisfy the licensee’s existing needs at the time of relocation. See Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, *Second Report and Order and Second Memorandum Opinion and Order*, ET Docket 95-18, 15 FCC Rcd 12315, 12344-12345 ¶¶ 91-94 (2000); Redesignation of the 17.7-19.7 GHz Frequency Band, *First Order on Reconsideration*, ET Docket 98-172, 16 FCC Rcd 19808, 19833-34 ¶¶ 57-59 (2001).

licenses for offset channels.<sup>25</sup> Sprint specifically focuses on one portion of the *Bureau Letter* that addressed public safety licensees that use NPSPAC channels on a “host” licensee’s system without obtaining their own authorizations to use the channels.<sup>26</sup> The Bureau stated that in such situations, a licensee without its own authorization may recover its retuning costs by showing that prior to rebanding, the licensee had an agreement with the host licensee to use the host system or made significant actual use of the host system.<sup>27</sup> Sprint contends that the *Bureau Letter* supports its position in this case because prior to rebanding, the County did not use and was not authorized to use non-mutual aid NPSPAC channels.<sup>28</sup> However, the present case does not concern a licensee operating without authorization on another licensee’s “host” system. The County is a NPSPAC licensee, is authorized to use the radios at issue on its own system, and rebanding requires that the radios either be replaced or retuned at Sprint’s expense. The only issue in dispute is whether replacement or reprogramming is required. Sprint’s reliance on the *Bureau Letter* is therefore misplaced because neither Sprint’s initial inquiry nor the *Bureau Letter* addressed the County’s situation.

13. Finally, we disagree with Sprint that the County is receiving an impermissible upgrade or that our holding here will lead other licensees to attempt to “goldplate” their claims for rebanding compensation.<sup>29</sup> While the record indicates that Sprint must pay more to replace the County’s radios than would be required to reprogram them, this does not constitute an upgrade because in this case, reprogramming is not sufficient to achieve the required level of comparability.<sup>30</sup> Thus, the added cost of replacing the radios meets the “minimum reasonable cost” standard articulated in the Commission’s orders, and Sprint is entitled to credit for the expenditure.<sup>31</sup> Our order also does not sanction goldplating by other licensees, but merely affirms that licensees who are required to retune their systems under the Commission’s orders in this proceeding are entitled to receive radios with the same technical capability as their existing radios.<sup>32</sup>

#### IV. ORDERING CLAUSE

14. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission’s rules, 47 C.F.R. §§ 0.191, 0.392; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 90.677, of the Commission’s rules, 47 C.F.R. § 90.677, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

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<sup>25</sup> Sprint PRM at 6-8, *citing* Letter dated February 12, 2007 from David L. Furth, Associate Chief, Public Safety and Homeland Security Bureau, FCC, to James B. Goldstein, Sprint Nextel Corporation, 22 FCC Rcd 2736 (2007) (*Bureau Letter*). See also Sprint Reply at 6-7.

<sup>26</sup> Sprint PRM at 8, *citing Bureau Letter* at 4.

<sup>27</sup> *Bureau Letter* at 4.

<sup>28</sup> Sprint PRM at 8.

<sup>29</sup> *See id.* at 6; Sprint Reply at 8.

<sup>30</sup> If it were technically feasible to provide the County with comparable NPSPAC-capable radios by reprogramming the radios at issue, Sprint would be entitled to reprogram the radios rather than replace them.

<sup>31</sup> *See 800 MHz Report and Order*, 19 FCC Rcd at 15073-74 ¶ 198 (2004) (reimbursable cost is the “minimum necessary to provide facilities comparable to those presently in use”); *800 MHz Supplemental Order*, 19 FCC Rcd 25120, 25152 ¶ 71 (2004) (TA may authorize the disbursement of funds for “any reasonable and prudent expense directly related to the retuning of a specific 800 MHz system”).

<sup>32</sup> Our decision in this case does not require Sprint to replace or reprogram NPSPAC-capable radios belonging to licensees that are not NPSPAC-eligible or do not otherwise have to retune their systems to accommodate rebanding.

15. IT IS FURTHER ORDERED that the Transition Administrator shall convene a meeting of the parties within seven days of the date of this Order for the purpose of negotiating a Frequency Relocation Agreement consistent with the resolution of issues set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

David L. Furth  
Associate Bureau Chief  
Public Safety and Homeland Security Bureau